Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. ~~78~~ 78-1633

GARY E. HALLMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Gary E. Hallman, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 28, 1979.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is at this time unreported, and is printed in Appendix A hereto. There was no written opinion issued by the United States District Court for the Central District of California

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered and filed on March 28, 1979. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In a tax evasion prosecution relating to joint income tax returns, using the net worth method of proof, may the Government limit its investigation of opening net worth solely to the assets and liabilities of the husband, and disregard the assets and liabilities of the wife?

Alternatively, in view of the mandate of Holland v. United States (1954) 348 U.S. 121, is not the marriage of the defendant in the year preceding the indictment years,known to the I.R.S., a "lead", requiring investigation of the assets that she has brought to family, and their impact on the defendant's net worth in the indictment years for which joint income tax returns were filed?

STATUTE INVOLVED

The conviction in this case was under 26 U.S.C.7201, which reads: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

The Defendant, Gary E. Hallman was convicted of two counts of violation of Title 26,

United States Code, Section 7201, commonly referred to as "tax evasion". The years involved were 1970 and 1971, during which the Defendant and his wife, Shari Hallman, filed joint income tax returns. The Government's case was based upon the "net worth and expenditures" method of proof. It was presented primarily through an extensive stipulation of fact, a net worth summary computation prepared by a special agent, and the computation of tax submitted by a revenue agent.

The Defendant became married during 1969, and that fact was known to the Internal Revenue Service. The evidence in the case relates solely to the net worth of Defendant, Gary E. Hallman, ignoring the assets and liabilities of Shari Hallman except for proof of the purchase of a home in 1970 by the Defendant and his wife. The special agent testified that his investigation was limited to the net worth and expenditures of the Defendant, without reference to Shari Hallman.

The revenue agent testified that his computation of the understatement of tax on the joint returns was based upon the net worth summary prepared by the special agent, and did not consider the assets or liabilities of Shari Hallman

REASONS FOR GRANTING THE WRIT

1. Introduction

The Court below held: "Thus, the trend of decision in this Circuit supports the conclusion that proof of spousal net worth is not a part of the Government's prima facie case, but rather fails under its obligation to negate explanations and leads."

This decision is directly in conflict with the decision of the Court of Appeals for the Fifth Circuit in United States v. Meriwether (1971) 440 F.2d 753,755. Meriwether is cited in Devitt and Blackmar, Federal Jury Practice and Instructions, 3d ed.,Sec.35.09, Notes, as follows: "When Government's evidence failed to cover the defendant's wife's assets,

submission of the net worth method is not justified."

In Holland v. United States (1954) 348 U.S.121, this Court set forth in detail the guidelines for use of the net worth method of proof. Since 1954 the Court has rarely heard cases dealing with indirect methods of proof in tax evasion cases, and in those isolated instances when it has, narrow issues have been resolved. This case presents to the Court broad questions dealing with the Government's burden of proof in cases using the net worth method, and the purported shifting of the burden to the defendant. We submit that resolution of this question is necessary for efficient administration of the criminal tax laws at both the investigative and judicial levels. Unless the conflict between the circuits is resolved, field investigators of the I.R.S. will have no set standards, and may run the risk of insufficient examinations,resulting in flawed prosecutions.

2. Failure to Investigate Net Worth of Spouse

In Holland v. United States,supra,348 U.S.121, this Court sanctioned use of the net worth method of circumstantial evidence, but only under rightly controlled guidelines, which we submit have not been followed in this case. This Court noted that the net worth method of tax evasion prosecution involves something more than the traditional use of circumstantial evidence in the usual criminal case and "... is so fraught with danger for the innocent that the courts must closely scrutinize its use. One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of the criminal law. Unlike civil actions for the recovery of deficiencies,, where the determinations of the Commissioner have prima facie validity, the prosecution must always prove the criminal charge beyond a reasonable doubt." 348 U.S. 125,126.

Holland then sets forth four separate elements to be established by the prosecution in its prima facie case:

(a) A definite opening net worth (p. 132);

(b) The investigation of leads (p. 135);

(c) Net worth increases must be attributable to taxable income (p. 137); and

(d) Willfulness (p. 139).

The net worth analysis relates to the taxpayers (348 U.S., at 125), in this case, Gary and Shari Hallman.

The error in this case is that the Government has failed to establish the opening net worth of Gary and Shari Hallman, and the Court of Appeals has imposed upon the defendant the burden of establishing that the increase in his net worth resulted from the input of Mrs. Hallman's assets.

"We agree with petitioners that an essen-

tial condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset." Holland v. United States, supra, 348 U.S., at 132. (Emphasis added)

In United States v. Meriwether (5th Cir.1971) 440 F.2d 753,755, the Court stated:

"Under its 'net worth' theory, however, the Government failed to establish with reasonable certainty a definite opening net worth of the joint income of Meriwether and his wife. Indeed, it came near ignoring Mrs. Meriwether. It did introduce her Alabama income tax returns for the years 1955 to 1963, but otherwise made no attempt to ascertain

her net worth."(Emphasis per report)[1/]

See also United States v. Beasley (5th Cir. 1975) 519 F.2d 233,247,248; United States v. Shy (D.C.Del.1974) 383 F.Supp.673,676.

In Beasley, supra, "the agents exhausted every avenue reasonably available to assess Mrs. Beasley's financial status as of the beginning of the period at issue." 519 F.2d, at 248.

The premise of Meriwether rests upon a sound foundation. The net worth method of proof rests upon the theory that if the taxpayer had an unexplained increase in net worth,and a likely source from which that increase arose, the Court could find

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1/ Since there was more than one method of proof submitted to the jury, and the net worth method was insufficient for failure to consider Mrs. Meriwether,the case was reversed and remanded. Upon retrial,the Government abandoned its net worth theory and relied solely on specific items of omitted income. United States v.Meriwether (5th Cir.1973)486 F.2d 489,500,reh.den. 487 F.2d 1401,cert.den. 417 U.S.948.

that the unexplained increase arose from unreported taxable income during the period in question. In order to establish the unexplained increase in net worth, however, the Government must clearly establish that there was an increase which could not be accounted for by a prior accumulation of assets. Since the net worth computation was to determine an understatement of income by Mr. and Mrs. Hallman, the opening net worth must be established as to both of them.

Some basic steps in meeting this Court's mandate are an interview of the wife, if possible, review of her prior separate tax returns, a search of the public records as to the acquisition and disposition of her assets, probate records, etc. In this case, there was no investigation into Mrs. Hallman's financial status. Did she have previous employment; was she

previously married and divorced with an attendant property settlement; was she the beneficiary of a substantial estate? The record clearly demonstrates that the Internal Revenue Service took no steps to answer these critical questions.

3. "Leads" and Burden of Proof

The Court below, in rejecting Meriwether, supra, notes that the Government correctly contends that it had no obligation to prove the spousal net worth because "of the absence of any evidence that Mrs. Hallman had significant earnings ..." It also noted that the defendant furnished no "leads" to the Government explanatory of the source of any assets possessed by him. The impact of the decision is to diminish the Government's burden of proof as set forth in Holland, supra. We earlier noted that Holland sets forth four separate and distinct elements to be established by the prosecution, including the establishment

of a definite opening net worth, and the investigation of leads. Each of these criteria is separate and distinct. The impact of the decision below is far-reaching. A listing of the taxpayer's assets is a critical step in determining the opening net worth from which the computation proceeds. If the Government does not adequately set forth all of the taxpayer's assets at the start of the period, can it then state that the taxpayer has the burden to furnish leads as to other assets? To the extent that the Government is deficient in its investigation in any aspect of the net worth computation, may it then shift the burden of proof to the taxpayer to supply the "leads"? Such a procedure would totally emasculate the Government's burden of proof, and would countenance slipshod investigation, since the taxpayer would have the burden to correct the errors of the Government. See Merritt v. United States (5th Cir. 1964) 327 F.2d 820.

The Court below at one time recognized the propriety of this analysis. In Lenske v. United States (9th Cir.1967) 383 F.2d 20, 23, the Court held:

> "Under the Holland teaching, a lead not furnished by the defendant but discovered by the special agent in his investigation would have at least equal status with a lead furnished by the defendant. The philosophy of Holland is that the trial of a tax fraud case by the net worth method places a defendant at a disadvantage dangerous to his liberty, and that some departure from the gamesmanship tactics of ordinary trials, even other criminal trials, is necessary to compensate for the disadvantage, and make the contest more nearly equal."

We submit that the possibility of a new wife furnishing assets to the marital community to

purchase a home, automobiles, and pay off pre-marital debts is per se a lead which must be investigated to establish the Government's prima facie case.

Reliance is placed by the Circuit in the stipulation of facts entered into by the parties. Stipulations are to be encouraged since valuable Court time is preserved. At no juncture was the defendant ever requested to stipulate to transactions with or participation of his wife because, simply stated, the Government had never done any work with respect to her. A generalized stipulation about gifts or loans would not encompass financial relationships between husband and wife in a community property state. A wife could supply substantial funds for the purchase of a residence in joint names without making a loan or gift to her husband.

The critical factor ignored by the Government pertains to the fact that where you have a joint income tax return, two human

beings are involved and a reconciliation must be made. Shifting the burden of proof to the defendant is impermissible,

JURISDICTION BELOW

The United States District Court for the Central District of California had jurisdiction of this cause by virtue of Title 18, United States Code, Section 3231. A timely appeal was prosecuted in the United States Court of Appeals for the Ninth Circuit, which had jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE I. HOCHMAN and
HARVEY D. TACK

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed March 28,1979

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY E. HALLMAN, Defendant-Appellant.	NO. 78-1385 OPINION

Appeal from the United States District Court for the Central District of California

Before: WALLACE and ANDERSON, Circuit Judges, and INGRAM,* District Judge

PER CURIAM:

Gary E. Hallman, hereinafter called appellant, appeals from his conviction after trial by court of violation of Title 26, U.S.C. § 7201, income tax evasion.

Reversal is urged on the basis that the Government failed to meet its burden of proof in establishing adequately appellant's opening net worth for each

*The Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

of the years in question. Specifically, appellant contends that the Government's proof was deficient in three areas:

1) There was a failure to consider and investigate the opening net worth of appellant's wife in establishing appellant's net worth;

2) There was an insufficient investigation in making the computation of cash on hand in establishing the opening net worth figure;

3) There was an insufficient investigation in making the determination with respect to appellant's securities or the proceeds of the sale thereof in establishing the opening net worth figure.

We affirm the conviction.

In contending that the Government's determination of opening net worth is defective because it failed to take into account the net worth of his wife,

appellant relies upon United States v. Meriwether, 440 F.2d 753 (5th Cir. 1971). That case holds that the Government must, in establishing its net worth theory, show with reasonable certainty a definite opening net worth of the joint income of the taxpayer and his spouse. The Government contends, correctly we believe, that it had no obligation to prove the spousal net worth because of the absence of any evidence that Mrs. Hallman had significant earnings, and because a stipulation of fact entered into between the parties expressly provided that appellant received no gifts, loans, inheritances or any other kind of non-taxable receipts during the calendar years 1969, 1970 and 1971.

In addition, appellant furnished no "leads" to the Government explanatory of the source of any assets possessed by him.

Thus, the issue here presented is whether the Government must establish the net worth of the spouse of the taxpayer as a part of its prima facie case, or whether the Government's duty to investigate spousal assets arises under its obligation to negate reasonable explanations or leads furnished by the taxpayer. This court's decision in Talik v. United States, 340 F.2d 138 (9th Cir.1965) and United States v. Chikata, 427 F.2d 385 (9th Cir.1970) appear to support the latter interpretation. In the latter case, the court found that no claim had ever been

asserted that spousal assets in any way contributed to the net worth of the taxpayer, and that it was not error to fail to instruct the jury to consider the spousal net worth as well as taxpayer's net worth. In the former case, the court indicated that a substantive question in a joint return case is whether a summation based on the net worth theory took account of spousal assets at the beginning of the taxable years for which the joint returns in issue were filed. The court then concluded that the existence of spousal assets is the proper subject of a lead, and that without such a lead the Government could not be required to negate every possible source of non-taxable income. Thus, the trend of decision in this Circuit supports

the conclusion that proof of spousal net worth is not a part of the Government's prima facie case, but rather falls under its obligation to negate explanations and leads. Notwithstanding appellant's novel argument based on Lenske v. United States, 383 F.2d 20 (9th Cir.1967), we do not agree that the possibility of a new wife bringing substantial assets to a marriage is itself per se a lead, of equal dignity to one furnished by the taxpayer.

In short, we feel that evidence of the receipt of no funds from non-taxable sources as reflected in the stipulation of facts, no evidence of substantial earnings on the part of the spouse, and no leads do not require the Government, in the words of Talik, "to hypothesize them (spousal assets) out of nothing."

Appellant also contends that the Government's proof of opening net worth was deficient because its proof of no cash on hand at the times in question was

based upon a purported uncorroborated admission contained in a financial statement filed by appellant with a bank at a time prior to the investigation conducted by the Internal Revenue Service. In that statement, appellant made no express representation that he had no cash on hand, but rather left blank the spaces provided for revealing that information. We agree with the Government's contention that the corroboration rule applies only to confessions or admissions made in the course of the commission of the offense or in the course of investigation. Smith v. United States, 348 U.S. 147 (1954); United States v. Bianco, 534 F.2d 501 (2nd Cir.1976), cert. denied, 429 U.S. 822 (1976); Fowler v. United States, 352 F.2d 100 (8th Cir.1965), cert. denied, 383 U.S.907 (1966).

In addition to the bank statement, there was other evidence of financial difficulties, loan renewals and overdrawn checking accounts which constitute a totality of cir-

cumstances consistent with the position of the Government.

Appellant contends finally that the Government did not conduct an investigation adequate to support its determination that appellant owned no securities at the net worth starting point. The evidence was that all of appellant's pre-starting point securities had been disposed of except two stocks which could not be traced. The Government with commendable candor concedes that appellant should have been credited with the ownership of those two stocks , but convincingly demonstrates that their inclusion as assets as of the opening date would not have materially altered the net worth computation.

Finding no material deficiency in the Government's method of proof or in its underlying investigation, we affirm.

Supreme Court, U.S.
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for income tax evasion on the ground that the government's opening net worth figure was invalid because it did not take into account his wife's assets and liabilities and therefore failed to negate the possibility that the increases in his net worth might have been attributable to his wife's assets.

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of evasion of the joint income tax liabilities of himself and his wife for 1970 and 1971, in violation of 26 U.S.C. 7201 (Tr. 167).[1] The district court sentenced him to concurrent two-year terms on each of the two

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[1] "Tr." refers to the trial transcript.

counts, but suspended the sentence of imprisonment and placed him on three years' probation. The court also imposed a $10,000 fine on each count (Tr. 179-180).

The prosecution relied on the well-established net worth method of proof. The government presented evidence that petitioner failed to report income derived from gambling activities and, as a result, understated the income tax liability on his joint tax returns by $10,449.40 in 1970 and $26,311.65 in 1971 (Tr. 103-104). The evidence, including evidence of petitioner's gambling activities, was largely stipulated. The government established that at the end of 1969 petitioner's liabilities exceeded his assets by $388.06 (Tr. 77-78). This opening figure formed the basis for the government's proof of increases in petitioner's net worth during 1970 and 1971.

The evidence also established that petitioner married Shari Hallman during 1969. In computing petitioner's opening net worth, the government did not take into account any assets separately owned by petitioner's wife at the close of 1969 (Tr. 107).[2] Petitioner challenged the accuracy of the government's opening net worth figure on the ground that it did not take into account his wife's assets. The district court denied petitioner's motion for judgment of acquittal on this ground (Tr. 157-167). The court of appeals affirmed (Pet. App. A). On the facts of this case, the court concluded that the government had "no obligation to prove the spousal net worth because of the absence of any evidence that Mrs. Hallman had

[2]During 1969-1971, petitioner and his wife were residents of California. Each spouse's property rights were therefore governed by California's community property law. Under that law, any property owned by petitioner's wife prior to marriage and brought into the marriage remained her separate property. See Cal. Civil Code § 5107 (West).

significant earnings, and because a stipulation of fact entered into between the parties expressly provided that [petitioner] received no gifts, loans, inheritances or any other kind of non-taxable receipts during the calendar years 1969, 1970 and 1971" (Pet. App. A-3).

1. Petitioner contends (Pet. 5) that the government's failure to take into account his wife's net worth is contrary to *United States* v. *Meriwether*, 440 F. 2d 753 (5th Cir. 1971), and that the decision below is in conflict with that case. In *Meriwether*, the court reversed a conviction for income tax evasion because, inter alia, "the Government failed to establish with reasonable certainty a definite opening net worth of the *joint income* of Meriwether and his wife" (*id.* at 755; emphasis in original). In so holding, the court observed that the government's computations virtually ignored the defendant's wife and, apart from introducing her state income tax returns into evidence, made no attempt to ascertain her net worth.

Here, however, as the court of appeals pointed out (Pet. App. A-3), the rule of *Meriwether* is not implicated because it was stipulated that petitioner received no non-taxable receipts during 1969-1971. On the basis of this stipulation, the court below correctly concluded that there was no factual issue as to whether petitioner's wife transferred separate property to him that might have been part of his net worth. While petitioner argues (Pet. 15) that the stipulation should not be read to cover his wife's separate property as a source of non-taxable receipts, the court of appeals' interpretation of the stipulation is consistent with its precise terms. At all events, this fact-bound question does not warrant review by this Court.

2. Contrary to petitioner's argument (Pet. 14-15), the fact of his marriage in 1969 did not of itself raise the inference that his wife had transferred separate property

to him and require the government to negate that possibility. The joint income tax returns filed by petitioner and his wife supported the inference that petitioner's wife had brought a meager income into the marital community (Tr. 143-144) and suggested that she did not possess substantial assets at the time of the marriage. Since petitioner failed either before or during trial to identify his wife as a potential source of non-taxable funds, the court of appeals correctly concluded that the government had established a *prima facie* case. "Once the Government has established its case, the defendant remains quiet at his peril." *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954). Because of his failure to supply any relevant leads during the investigation, the court of appeals properly rejected petitioner's belated claim that his wife might have possessed substantial assets which she might have conveyed to him (Pet. App. A-4 to A-6). Accord, *United States* v. *Bianco*, 534 F. 2d 501, 506 (2d Cir.), cert. denied, 429 U.S. 822 (1976). As this Court has stated: "* * * [W]here relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter *peculiarly within the knowledge of the defendant*." *Holland* v. *United States, supra*, 348 U.S. at 138 (emphasis supplied).

In sum, absent any evidence that petitioner's wife had substantial assets, the court of appeals correctly held that the government was not required " 'to hypothesize them (spousal assets) out of nothing' " (Pet. App. A-6), quoting from *Talik* v. *United States*, 340 F. 2d 138, 140 (9th Cir. 1965). See *United States* v. *Penosi*, 452 F. 2d 217, 220-221 (5th Cir.), cert. denied, 405 U.S. 1065 (1972); *United States* v. *Chikata*, 427 F. 2d 385 (9th Cir. 1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1979

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